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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 698

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Major Daniel F. Boone, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of North Carolina entered in the above cause on November 4, 1942, affirming the judgment of the Superior Court of Henderson County, North Carolina, entered on May 26, 1942 (R. 48).

OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in making orders and rendering a judgment. (See R. 39-60.)

The opinion of the Supreme Court of the State of North Carolina (R. 199) appears in 222 N. C. 205 (Adv. Sheets).

STATEMENT OF MATTER INVOLVED.

At all times during the period of this litigation, petitioner has been and now is a member of the armed forces of the United States on active duty and stationed in Washington, D. C.

This action was instituted against petitioner in the Superior Court of Polk County, North Carolina, on June 21, 1941. The purpose of the action was to declare petitioner a trustee of certain funds in his possession and to remove him as trustee in the event he failed to account for said funds (R. 7, 8).

Petitioner set forth his defense to the action in his answer (R. 24-36) to the complaint. In his answer, petitioner stated among other things, that he was on active duty in the armed forces and residing in the District of Columbia (R. 25).

The action came up for hearing on February 2, 1942, in the regular January-February term of the Superior Court of Polk County, North Carolina, at which time, petitioner moved the court for a continuance (R. 49); that the court thereupon transferred this action to the Superior Court of Henderson County, North Carolina, and set the case peremptorily for trial on May 25, 1942 (R. 50).

On May 13, 1942, twelve days before the trial, Major Roy L. Deal, counsel for petitioner, was called to active military duty in the armed forces of the United States (R. 57).

On May 25, 1942, when the Superior Court of Henderson County, convened, a written application and motion for a continuance of the action was filed in petitioner's behalf, praying for relief under the Soldiers' and Sailors' Civil

Relief Act of 1940 (54 Stat. 1178) and for a continuance of the trial of the action until after the termination of his military service, "or until such time as he can properly conduct his defense" (R. 55).

In support of the application and motion for a continuance or stay of proceedings, two affidavits were filed—one by petitioner and the other by Major Roy L. Deal, petitioner's local counsel (R. 58-9).

Petitioner's affidavit (R. 55) stated among other things: (1) that he was a Major on active duty in the United States Army, (2) that he had been assigned to and stationed at Washington, D. C., (3) that the volume of work in his office was extremely heavy and that no leaves were being granted, except in cases of serious emergency, (4) that the trial of the action would require the bringing of three witnesses to North Carolina from other states and that two of these were in the United States Army and not stationed in the State of North Carolina, (5) that local counsel for petitioner had entered on active military duty with the Army of the United States twelve days prior to the convening of the court, (6) that it was necessary for petitioner to obtain other local counsel to represent petitioner, and (7) that petitioner's ability to defend was materially affected by reason of his military service (R. 57-58).

The affidavit of Major Roy L. Deal (R. 58) set forth that (1) he was counsel for petitioner, (2) he was ordered to and entered active military service on May 13, 1942, at Washington, D. C., and (3) it was impossible for him to appear as attorney in the trial of the case, especially since leave was obtainable "only in special emergency."

Despite the fact that petitioner had complied with the order of the trial court of Polk County, North Carolina, entered February 2, 1942 (R. 43) and deposited the securities (which was the subject matter involved in the litigation) with the Clerk of the Superior Court of Henderson County, North Carolina, (R. 43), the trial court summarily and without a hearing or without further evidence before it, denied the application for a continuance of the action

(R. 59-60). The trial court completely failed to make any further inquiry or to take any testimony on whether the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

The trial court merely stated as a conclusion in its findings of fact that petitioner was "deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the act [Soldiers' and Sailors' Civil Relief Act] referred to above to avoid such determination" (R. 59). The Court further, *without any evidence or record before it to sustain the conclusion,* "found" that the motion for a continuance was made after petitioner's refusal "in one or more instances" in other litigation to "appear in the courts of North Carolina." The record does not disclose to what other litigation the Court refers, and the Court does not say. If the Court refers to the record of some other court in North Carolina, the authenticated record of such court should have been introduced. If it were a record of the trial court, judicial notice should have been taken of the particular record.

This vague and unsupported statement indicates that the trial judge was aware that his conclusion that the defendant's ability to defend the action was not materially affected by his military service lacked and badly needed supporting evidence.

Thereupon, "in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case" (R. 61).

Among other things, the trial court on May 26, 1942, awarded a money judgment against petitioner in the sum of Nineteen Thousand Six Hundred Seventy-Seven Dollars and Ninety-Nine Cents ($19,677.99) on which a credit was allowed of Eight Thousand One Hundred Eighty-Seven Dollars and Forty-Three Cents ($8,187.43) and rendered a judgment in the sum of Eleven Thousand Four Hundred Ninety Dollars and Fifty-Six Cents ($11,490.56) (R. 46, 48).

On appeal to the court of last resort, the Supreme Court

of the State of North Carolina affirmed the trial court in all respects.

JURISDICTIONAL STATEMENT.

The statutory provision which sustains the jurisdiction of this court is Section 237 (b) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. § 344 (b) which provides that:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute of, * * * the United States. * * * "

In this case, the right, privilege or immunity set up or claimed by Petitioner is granted to him under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, and more particularly at 54 Stat. 1181.

The judgment of the Supreme Court of North Carolina was entered November 4, 1942, and is a final judgment against petitioner. It is, therefore, final for purposes of this Court's jurisdiction.

STATUTE RELIED UPON BY PETITIONER.

The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, is relied upon by petitioner. Section 100 of the Act reads:

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to

enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 201 of the Act reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person, on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Other pertinent sections of the Soldiers' and Sailors' Civil Relief Act of 1940 are set forth in the Appendix.

QUESTIONS PRESENTED.

(1) Did the Supreme Court of North Carolina err in sustaining a personal judgment against a member of the armed forces of the United States on active military duty at Washington, D. C., who could not be present in person to defend and who was not represented by counsel at the trial of an action brought against such army officer when such army officer moved for the relief provided him by an act of Congress, the Soldiers' and Sailors' Civil Relief Act of 1940?

(2) May a judgment be rendered against an army officer on active military duty, who claims the relief provided in the Soldiers' and Sailors' Civil Relief Act of 1940, when such officer specifically requests a continuance or stay of proceedings under Section 201 of said Act and makes a show-

ing to the trial court that his ability to conduct his defense has been and is materially affected by his military service, and there is no evidence before the trial court to sustain a finding that the ability of the petitioner to defend is not materially affected by military service?

(3) May a state court summarily brush aside the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and render a judgment against an army officer on active military duty who prays for the relief afforded by said Act?

(4) Was there compliance by the state courts of North Carolina with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and more particularly with Section 201 of said Act?

(5) Was there due process of law in a case wherein (1) an army officer is a defendant and cannot be present in person because of military service, (2) local counsel for the army officer cannot be present because he has recently entered upon active military service and (3) two important witnesses are outside of the State in military service and the court refuses to grant a continuance?

(6) May a trial court arbitrarily proceed with a trial without appointing an attorney to represent a person in military service who does not personally appear at the trial because he is on active military duty and cannot secure leave and is not represented by his attorney who is also on active military duty?

REASONS FOR GRANTING CERTIORARI.

Petitioner respectfully submits that the writ of certiorari should be granted in this cause for the following reasons:

(1) The state court has decided a Federal question of substance not heretofore determined by this court and the state court has given a construction to the Soldiers' and Sailor's Civil Relief Act of 1940 not intended by the Con-

gress and clearly in violation of the express words and intent of the Act.

(2) The state court has construed the Soldiers' and Sailors' Civil Relief Act in such a manner that if the interpretation is allowed to stand it will have a serious effect on the morale of the armed forces of the United States especially those men who may be sued in the state courts.

(3) The questions presented are of wide importance. There are many lawsuits filed against men on active duty in the armed forces of the United States and it is essential that all courts have an authoritative determination by this Court.

(4) A proper exposition of the intent of the Act is of great public importance, since all lawsuits filed against men in the armed forces of the United States come face to face with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

The foregoing propositions were presented to the Supreme Court of North Carolina but that court failed to place a proper construction upon the Soldiers' and Sailors' Civil Relief Act and also denied to the Petitioner the protection of the Fourteenth Amendment to the Constitution of the United States.

If the notion of the Supreme Court of North Carolina is allowed to stand then any trial court can proceed to hear a case and render a judgment against one in the armed forces by merely paying lip service to the Soldiers' and Sailors' Civil Relief Act of 1940. All that is necessary in order to conform to that Act, in the opinion of the North Carolina Court, is a statement by the trial court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. This will be legal legerdemain and the result if the opinion of the North Carolina Supreme Court sought to be reviewed by this petition is allowed to stand.

WHEREFORE, your petitioner respectfully prays that this Court issue a Writ of Certiorari to the Supreme Court of the State of North Carolina, to certify and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs and for such other and further relief as may be appropriate and granted in the premises.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of North Carolina sought to be reviewed is reported in 222 North Carolina reports 205 (advance sheets), and appears in the record filed herein beginning on page 199 and continuing through page 204 inclusive.

JURISDICTION.

The petitioner contends first, that under Section 237 (b) of the Judicial Code, as amended, he is entitled to have the opinion of the Supreme Court of North Carolina reviewed, since the petitioner has set up and claims a right, privilege,

or immunity, under a statute of the United States and such statute has not been properly construed by the Supreme Court of North Carolina.

Secondly, the petitioner contends there are two distinct federal questions involved. In the first instance, the Supreme Court of North Carolina failed to give a proper interpretation to a Statute of the United States. This results in a Federal question sufficient to warrant a review by this court.

In *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40 (1941) this Court said:

> "• • • This action was based wholly on interpretation and application of the Securities Act. Thus a federal question arose which demands determination."

In *Nutt* v. *Knut*, 200 U. S. 12, 19 (1906) the Court said:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held • • • to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved." (citing cases)

The record in the state court clearly discloses that the Soldiers' and Sailors' Civil Relief Act of 1940 was set up and claimed and that relief pursuant thereto was denied as the court in its opinion states: "The burden of the appeal is that the defendant has been deprived of his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940."

See *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477, 488 (1912); *St. Louis, Iron Mountain and Southern Railway Co.* v. *Taylor, Administratrix*, 210 U. S. 281, 293 (1908).

In addition see *Ebert et al.* v. *Poston*, 263 U. S. 694 and

266 U. S. 548 (1925) where this Court granted certiorari in a case dealing with the Soldiers' and Sailors' Civil Relief Act of 1918.

In the second instance, the petitioner was deprived of property without due process of law, since the court of North Carolina could not by virtue of the Fourteenth Amendment to the Constitution of the United States proceed to a trial in the absence of the petitioner or of any attorney representing him and without appointing counsel to represent the petitioner. The absence of the petitioner and his counsel was not due to any negligence but was due to military service. The principles of justice without any Soldiers' and Sailors' Civil Relief Act warranted a continuance.

STATUTE INVOLVED.

The statute involved is the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 50 U. S. C. App. Sec. 501 *et seq.*). The pertinent provisions are set forth, *infra*, in the Appendix.

SPECIFICATION OF ERRORS TO BE URGED.

1. The lower court erred in failing to properly interpret the Soldiers' and Sailors' Civil Relief Act.

2. The lower court erred in failing to receive evidence or require some showing that the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

3. The lower court erred in denying petitioner's application for a continuance without first entering a proper factual finding, based upon evidence or affidavits, that the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

4. The lower court erred in proceeding to trial in the absence of the petitioner and his counsel.

5. The lower court erred in proceeding to trial without appointing an attorney to represent petitioner in accordance with the provisions of the Soldiers' and Sailors' Civil Relief Act.

6. The lower court deprived petitioner of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by proceeding to trial under the circumstances.

SUMMARY OF ARGUMENT.

This Court has not had occasion to decide any case in which an application for a continuance or stay of proceedings has been made by an army officer in active military service pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act.

At the outset, we should point out that there is no question whatsoever that petitioner is within the purview of persons covered by the Soldiers' and Sailors' Civil Relief Act of 1940 (see section 101 (1) of the Act). Furthermore, there is no question that the Superior Court of Henderson County, North Carolina, is covered by the provisions of the Act (see section 101 (4)).

The entire case revolves about (1) the relief afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 and the true construction of certain provisions in such Act and (2) even if there were no specific provisions in the Soldiers' and Sailors' Civil Relief Act of 1940 dealing with continuances and stays of proceedings of cases against men in the armed forces that the principles of justice under the due process clause of the Fourteenth Amendment to the Constitution would require that courts give serious consideration in granting continuances in cases affecting men on active duty in the armed forces of the country when such soldier could not personally be present to defend at the time the cause was set for hearing and in light of the further fact that his local counsel was also absent because of active mili-

tary service. We submit that phase (2) was not presented to the state court with any emphasis.

The legislative purpose of the Act (clearly stated in express words in section 100) was to suspend enforcement of civil liability in certain cases of absence in military service of the United States, in order to permit such persons to devote their entire energy to the defense needs of the Nation. We must bear in mind that the Act was enacted prior to any declaration of war by or against our country. Today, it is much more necessary for the courts to carry out the express mandate of the Congress.

Section 201 of the Act provides the fundamental basis for the procedure used by petitioner in the lower court in requesting the continuance or stay of proceedings and also is relied upon by the lower court in denying the relief requested.

Petitioner contends that this court as determined in *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935) and cases cited therein should and may review the record in order to determine whether or not there was a basis for the refusal by the state courts to enforce the federal right, privilege, or immunity granted by section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner contends that (1) there is not a scintilla of evidence in the record (not even dehors the record) to support a finding by the state court that petitioner's ability to conduct his defense is not materially affected by reason of his military service; (2) Section 201 of the Soldiers' and Sailors' Civil Relief Act requires a finding by the trial court that the ability of a "defendant to conduct his defense is not materially affected by reason of his military service" to be based on evidence and the burden of proof is on the party submitting such evidence as was so well stated by Judge Delehant in *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) at 743; (3) the lower court if it based its finding on any evidence whatsoever could not reasonably have so found because definitely contrary to fact, and a reading of the rec-

ord by this court will prove this; (4) the lower court was arbitrary and capricious in refusing the continuance or stay of proceedings to the petitioner when petitioner was on active military duty and in addition his local counsel was not available because local counsel had also been called to active duty in the armed forces just twelve days before the cause came up for trial; (5) the policy of Congress in writing the Soldiers' and Sailors' Civil Relief Act is pushed aside by the treatment accorded petitioner by the state courts and if allowed to prevail will undermine the morale of the men fighting on many fronts and more especially those who have been or will be sued in state courts and more particularly the courts of North Carolina.

ARGUMENT.

I.

Purpose of Soldiers' and Sailors' Civil Relief Act of 1940.

Section 100 of the Act clearly states the legislative purpose of the Act.

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

It is clear that a reversal of the state court by this Court will not affect any of the rights of the plaintiffs in the lower court. The day of reckoning is merely delayed and the army

officer who was several hundred miles away when his interests were being affected will not be harassed by litigation and thus be given a full opportunity to render that full measure of devotion to duty that he has sworn to render. At a more opportune time the merits of the case can be determined with all parties having their day in court.

The bona fides of the petitioner is clearly demonstrated by his deposit with the clerk of the trial court the subject matter of the trust in litigation and no loss can result to plaintiffs from this aspect.

II.

State Court Did Not Comply With Section 201 of Soldiers' and Sailors' Civil Relief Act of 1940.

This argument of petitioner revolves about a correct construction and interpretation of Section 201 of the Act.

Section 201 reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such persons or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

There is no question whatsoever that application on behalf of the petitioner was filed in proper time for the relief accorded by this section to him as a defendant. The section speaks in mandatory language when an application is filed by the person in the armed forces or by someone in his behalf.

The issue is joined on the proper construction of the words:

> "unless, in the opinion of the court, the ability of • • • the defendant to conduct his defense is not materially affected by reason of his military service."

A. No evidence to support state court's finding.

This court may and should read the record in order to determine whether there was evidence to sustain a finding by the trial court (R. 59) that the ability of petitioner to conduct his defense was not materially affected by his military service.

We submit that "lip service" by the state court is not enough in carrying out the provision of the law.

In *Norris* v. *Alabama*, 294 U. S. 587 (1935) at 590:

> "• • • When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (citing cases)

All that the lower court had before it in connection with the question of petitioner's ability to conduct his defense were the affidavits of petitioner (R. 55) and his counsel (R. 58). True, the court also had the complaint (R. 7) and the answer (R. 24-36) filed by petitioner but it cannot be fairly concluded that the court could rule that petitioner had no defense by merely reading the answer and thereupon going the next illogical step and concluding that the ability of petitioner to conduct his defense was not materially affected by reason of his military service.

Yet, this is exactly what the trial court did and the Supreme Court of North Carolina gives its voice of approval to such procedure. The trial court stated "From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it ap-

pears that the defendant did not have a defense." O tempora! O mores! Such legal legerdemain when a trial judge desires to reach a certain conclusion!

The absence of petitioner from the trial, the fact that he had no active counsel in the case, the fact that leave of absence from military duty is an exception (granted in dire emergencies only) and not the rule in time of war and the fact that a personal judgment of over eleven thousand dollars is rendered would make one hesitate to conclude that military service did not materially affect petitioner's ability to defend.

B. Burden of proof on person objcting to continuance.

We submit that the burden of proving that no continuance or stay of proceedings should be granted is upon the parties objecting to the continuance.

In *Bowsman* v. *Peterson,* 45 F. Supp. 741 (D. Neb. 1942) plaintiff brought action to recover for injuries and property damage resulting from an automobile accident. Motion of the defendant to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 was sustained. Judge Delehant analyzes sections 201 and 204 of the act very clearly and we quote from his opinion here and elsewhere in this brief. At 45 F. Supp. 743, Judge Delehant states:

> "In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of the stay mandatory, 'unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

> "No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful or the showing made in furtherance thereof persuasive."

In the case at bar no attempt was made by any of the parties to show that petitioner's ability to conduct his defense was not materially affected by his military service because we submit that it was and is factually an impossibility.

III.

Liberal Interpretation of the Act is Proper.

In *Royster* v. *Lederle,* 128 F. (2d) 197 (C. C. A. 6th, 1942) a writ of mandamus was filed to compel Judge Lederle to vacate and set aside his order of continuance in *Royster* v. *Ruggerio,* 2 F. R. D. 429 pursuant to section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner had suffered injuries in an automobile accident and sued "X" prior to his induction into the armed forces. "X" had also been found guilty of reckless driving and was given a probated sentence. Petitioner was willing to proceed with the case and was anxious to limit recovery to the liability insurance policy carried by "X" and petitioner further maintained that "X" had no defense because of his testimony in criminal court and therefore, "X" would not be of material aid to the insurance carrier. The desires of the petitioner were not granted although the court added an additional protection for her benefit in sustaining a continuance.

Judge Hamilton said at 128 F. (2d) 200:

> "The statute in question must be liberally construed to effectuate its purpose. We cannot say, as a matter of law, that Ruggerio's rights would not be affected by proceeding to the trial of the cause in his absence. * * * A party to an action should not be compelled to go to trial in his absence or in the absence of the only witness by whose testimony he can make out his defense, unless it appears that he has been guilty of negli-

gence in failing to attend the trial or procuring the attendance of the witness on whom he relies or in obtaining his testimony by deposition or otherwise. Ruggerio has not been guilty of any negligence in failing to attend the trial, and his insurance carrier likewise has not been guilty of negligence in failing to obtain his attendance at the trial or to take his deposition."

See also *Clark* v. *Mechanics' American Nat. Bank et al.*, 282 Fed. 589 (C. C. A. 8th, 1922).

In *Ilderton* v. *Charleston Consol. R. Co.*, 113 S. C. 91, 101 S. E. 282 (1919), an employer was sued for damages suffered by plaintiff. The motorman for whose negligence the employer was sued was in the armed forces. The court held that the trial court should have granted the defendant's motion for a continuance because the motorman was interested in the outcome of the suit for the reason that if it were decided adversely to the employer the motorman would be liable over. Furthermore, the motorman was the only witness whereby the employer could defend and the Supreme Court of South Carolina held that a continuance should have been granted.

The *Ilderton* case indicates a true construction and understanding of the relief provided by the Act.

IV.

Analysis of Cases Cited by North Carolina Supreme Court on Act.

The North Carolina Supreme Court in its opinion (R. 203) cites several cases in support of its conclusion. We submit that these cases are not in point.

(1) *Pope* v. *United States Fidelity & Guaranty Co.*, ... Ga. App. ...., 20 S. E. (2d) 618 (1942).

In May, 1934, a *judgment* was rendered against Mr. Pope and the U. S. F. & G. became the transferee thereof. In May, 1941, U. S. F. & G. had the sheriff levy on the life estate of Mr. Pope in certain lands and the property was being advertised for sale in September, 1941; furthermore

U. S. F. & G. garnished a third party in June, 1941, and the third party admitted an indebtedness of $622.77 to Mr. Pope and the third party paid the indebtedness into court. Mr. Pope was on duty as a lieutenant-colonel in South Carolina and he asked for a suspension and abatement of the proceedings while he was in the military service. The lower court granted a thirty-day stay. Subsequently U. S. F. & G. readvertised the property for sale and Mr. Pope again filed his motion for a further stay which the lower court denied and on appeal to the Court of Appeals of Georgia, this action was affirmed.

The *Pope* case dealt with a *judgment* rendered seven years before the U. S. F. & G. started the proceedings in the case. Colonel Pope did not file any affidavit showing that his ability to *pay* was materially affected by his military service. In fact, U. S. F. & G. filed a lengthy affidavit showing among other things the lack of good faith in the case and in addition the earnings of Colonel Pope. In other words, U. S. F. & G. introduced a verified answer to the effect that Colonel Pope could comply with the judgment. (See opinion at 20 S. E. (2d) 620).

We submit that much of the language used by Judge Sutton in discussing the Soldiers' and Sailors' Civil Relief Act if removed from the context and frame of the opinion could be criticized. Suffice it to say, however, at this point, that the Georgia Court had before it evidence demonstrating an ability to pay an old judgment procured before Colonel Pope had entered on active duty while the case at bar has no evidence whatsoever that petitioner's ability to defend has not been materially affected by his military service.

But compare *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) with the *Pope* case.

(2) *Jamaica Sav. Bank* v. *Bryan, et al.*, 175 Misc. 978, 25 N. Y. S. (2d) 17 (1941).

Plaintiff bank sought to foreclose a mortgage and named several defendants including the owner and her husband who claimed he was a soldier. Husband and wife asked the

court to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. The court felt it needed and asked for proof on the point that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. That is all the case stands for because the court felt that the "soldier" defendant was liable on the bond with his wife, the owner of the property.

Subsequent thereto (Supreme Court of North Carolina does not cite) *Jamaica Sav. Bank* v. *Bryan et al.*, 25 N. Y. S. (2d) 641 (1941) came up for determination. The court then pointed out that the "soldier"-husband was not liable on the bond and was a nominal defendant because of occupancy. Furthermore, he really was only in the National Guard and his military duties did not require his full time. The court concluded that the Soldiers' and Sailors' Civil Relief Act of 1940 was not applicable.

Need petitioner say anything further about the *Jamaica* case cited by the Supreme Court of North Carolina?

V.

Other Pertinent Cases on the Act.

In *Swiderski* v. *Moodenbaugh*, 44 F. Supp. 687 (D. Oregon, 1942) an action was brought against a soldier for injuries sustained by plaintiff in a collision with a car driven by defendant-soldier. The action was brought when defendant was out of the service and he attended the pre-trial conferences and his deposition was taken as an adverse witness while he was on inactive duty (to all practical purposes a civilian). The trial was delayed but, the case was finally called for trial when the defendant was back on active duty. Plaintiff agreed to limit his recovery to the casualty insurance policy carried by defendant and further not to seek a personal judgment against defendant. The court, thereupon, allowed the trial to proceed and denied the motion of defendant for a postponement of further action. But compare *Lanham et al.* v. *Cline*, 44 F. Supp. 897 (D. Idaho, 1942).

See *Korsch* v. *Lambing*, 28 N. Y. S. (2d) 167 (1941) where the stay was granted because defendant was in the service and was a necessary witness to the defense. See also Annotations in 130 A. L. R. 774-812 and 137 A. L. R. 451-455.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb., 1942) the court in granting a motion to stay the proceedings stated at p. 743:

> "But here the statute seems to be imperatively controlling both as to the necessity for the stay, 50 U. S. C. A. Appendix § 521, and for practical purposes, as to its duration, 50 U. S. C. A., Appendix § 524. By Sec. 524, it is provided that 'Any stay of any action • • • ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period • • •'. It is true that the language is permissive. But it is likewise obvious that it reflects an instructive legislative policy to place the person engaged in the military establishment beyond the effect of the urgencies and uncertainties of pending litigation, and to allow him a reasonable period following his discharge to reorient himself with a view to the trial of his cause. So, if a continuance is in order, there would seem to be a rather clear congressional intimation that in the ordinary case it should be granted in general terms for the duration of the applicant's service and three months thereafter.' It is presently impracticable to attempt to limit stays, except in extraordinary cases, to 'any part of such period.'
>
> Section 521 deals with the conditions under which a stay of proceedings will be allowed. It provides that: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant

to conduct his defense is not materially affected by reason of his military service.'

In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of a stay mandatory, 'unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful, or the showing made in furtherance thereof persuasive.

The Soldiers' and Sailors' Civil Relief Act of 1940 (in like manner with all similar previous acts in our history) was prompted by at least two considerations, first, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense.

The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation. Without unnecessary discussion, it may simply be stated that while the Act recognizes that in some instances 'the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service,' such instances will be relatively rare. And the court is not made aware of any circumstances upon which it may be concluded that this is one of them.

There is nothing novel either in the legislation which the defendant now invokes, or in the policy of the judicial and social indulgence towards the absent soldier. Only presumption would impel a judge, in a memorandum of this character, to assemble from legal and gen-

eral literature the abundant examples of the latter grace. And as to the former, it will be sufficient merely to mention the numerous statutes enacted during the Civil War upon the point (vide: 13 C. J. 143, Title, Continuances Sec. 42 (2), Note 68 and cases cited; 17 C. J. S., Continuances, § 30) and the more recent Soldiers' and Sailors' Civil Relief Act of 1918, 50 U. S. C. A., Appendix § 101, et seq., especially Secs. 112 and 115. It may be granted that a continuance will probably operate at least temporarily and perhaps permanently to the disadvantage of the plaintiff. That result is unfortunate. But it is a reasonable exaction by society from one of its members for its own preservation; a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to 'provide for the common defense.' ''

CONCLUSION.

An army officer on active military duty and entitled to the relief of the Soldiers' and Sailors' Civil Relief Act of 1940 is denied a continuance of a case in which he is the defendant. The trial court summarily concludes that the army officer's ability to defend is not materially affected by such military service and proceeds to grant a personal judgment against such army officer despite the fact that (1) local counsel for the army officer cannot participate in the trial because he, too, has reported for active military duty just twelve days before the trial, (2) the army officer is several hundred miles away and cannot get leave except in serious emergencies, (3) affidavits are submitted by such army officer and his local counsel and a request for a continuance is made, (4) no proof is submitted by anybody that such army officer can conduct his defense and that his ability is not materially affected by military service, (5) such army officer has a defense to the serious and personal charges made against him, and (6) a substantial sum of money is involved.

The relief afforded by the Soldiers' and Sailors' Civil Relief Act should not be so lightly brushed aside by any court. Our country is at war and the morale of the members of the

armed forces must be sustained. That is part of the battle on the home front. Yet the North Carolina courts, in this case, have paid homage to the act by merely noting its provisions. There is not a scintilla of evidence in the record to justify the treatment accorded petitioner in the state courts.

The North Carolina courts, in this case, merely pay "lip service" to the Soldiers' and Sailors' Civil Relief Act and proceed to sustain a personal judgment against an army officer who has a defense to the action, but who could not attend the trial because of his military duties.

It is petitioner's contention that the statutory continuance allowed him by the Act placed the burden of proving his ability to defend was not materially affected by his military service squarely on those who opposed the continuance. No evidence was submitted by the other side. Perhaps it was unnecessary because the trial judge seems to have moved on his own initiative. Such treatment to a soldier of the United States by state courts will not be allowed, we trust, so long as this Court sits.

We submit that a refusal to grant the petition will place this Court's stamp of approval on the treatment accorded petitioner which will have deleterious effects on the morale of the members of our armed forces. Such adverse news will spread throughout the entire Army and Navy here and abroad and will create a disturbance of mind in the men away from home that they are not secure in their rights and property.

The right, privilege, or immunity given to petitioner by the Federal Act cannot be frittered away so easily by mere words of a trial judge.

We submit that the Court should grant the Writ of Certiorari in order to properly construe the Act passed by the Congress as part of its war legislative program to the end

that justice may be done directly to a member of the armed forces and indirectly to the millions of men and women who are fighting on every front.

Respectfully submitted,

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APPENDIX.

Pertinent Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940.

54 STAT. 1178

Section 101.

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

• • • • • • • • • • •

"(3) The term 'person,' when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association."

• • • • • • • • • • •

"(4) The term 'court,' as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

• • • • • • • • • • •

Section 200. • • •

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney

appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

• • • • • • • • • • •

Section 201.

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

• • • • • • • • • • •

Section 205.

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."